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A BETTER PREPARED BAR—THE WRONG APPROACH†

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It is a pleasure for me to add my voice to this *Symposium* in pursuit of our shared goal of a better prepared bar. My Brother Clare and his estimable colleagues have labored most conscientiously to produce a proposal¹ that they believe will bring us significantly closer to that goal. I respectfully disagree.

My disagreement does not, however, imply endorsement of all of the criticisms attracted by the report of the Advisory Committee on Qualifications to Practice Before the United States Courts in the Second Circuit (Clare Committee or Committee). To begin with, I do not at all quarrel with the assertion that there is room for improvement of the bar, nor do I make territorial claims for law schools. I acknowledge freely and gratefully that bench and bar have a vital role to play in legal education, and I abjure any and all claims on the part of law professors to *exclusive* responsibility for continued improvement of the bar. I also disavow with all the emphasis I can muster the notion that the Clare Committee's proposal should be dismissed on the ground of high cost. If this proposal is worth adopting, it is no defense that it might be expensive to implement.

Indeed, so that you will know my own sentiments about the virtue of trial practice instruction, I am proud to report that, at the Columbia Law School during the current academic year, we are offering 9 sections of trial advocacy and 11 sections of clinical work, and I am not counting a number of related seminars. We are, in other words, offering over 20 courses or seminars involving students in the actual performance or simulation of the trial advocate's work.

Why, then, do I object to the Clare Committee recommendations? My opposition rests on three related grounds: First, we have no evidence, nor has the Clare Committee presented any, to sup-

† This Article is based upon remarks prepared for delivery at the 1976 Midwinter Meeting of the National Conference of Bar Presidents. A similar address was delivered by Dean Sovrn at the 36th Annual Judicial Conference of the Court of Appeals for the District of Columbia Circuit on June 3, 1975 and appears in 67 F.R.D. 577 (1975).

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¹ See ADVISORY COMM. ON PROPOSED RULES FOR ADMISSION TO PRACTICE IN THE SECOND CIRCUIT, FINAL REPORT, in 67 F.R.D. 161 (1975).

port the proposition that observed deficiencies in federal court trial advocacy correlate in any way with a failure to take designated courses in law school; second, while offering little hope for an improvement in the quality of trial advocacy, the proposed rules do raise a serious risk of damaging other important educational values; and third, the proposal overlooks other, potentially more fruitful means of improving the quality of trial advocacy.

I recognize that the Clare Committee's proposal permits compliance through postgraduate training or the making of a special showing.² But what prudent law student will pass up the certain compliance of a law school course when the alternative is either postgraduate training or a showing especially made? For practical purposes, the proposed rule so nearly approaches a curricular requirement that it seems wise to treat it as such. The proposal rests on the implicit premise that some sort of correlation exists between the taking of the listed courses and the quality of advocacy in the federal district courts. If the Committee had put its premise to the test with respect to Evidence and Civil Procedure, the first two of its requirements, it would have learned that the overwhelming majority of advocates, good and bad, took and passed those courses. The number of practicing lawyers lacking formal instruction in Evidence and Civil Procedure is too small to be dragging down the quality of trial advocates.

With respect to the Committee's third requirement, Criminal Law and Procedure, it is my strong impression, though I have no quantified data, that a substantial majority of recent graduates from American law schools have studied both Criminal Law and Criminal Procedure. Once again, I have no reason to believe that the alumni of those courses will be found in any greater proportion among the best advocates than among the poorest. Indeed, Columbia's great prosecutors, Charles Breitel, Thomas Dewey, Stanley Fuld, Frank Hogan, and others, could not have taken Criminal Procedure in law school because we had not yet discovered it at Columbia. Required instruction in the fourth subject, Professional Responsibility, is a condition of accreditation by the American Bar Association (ABA), and requiring this course would be redundant. The final requirement, Trial Advocacy, is the hardest to evaluate because it takes so many curricular forms. At Columbia, in some years, more than two-thirds of our students will take instruction in one form or another of trial advocacy. At some schools, the proportions are higher; at still others, lower.

² *Id.* at 171.

The central point remains: the notion that the study of trial advocacy is a determinant of high or low quality performance in the federal courts is not only unproven, it is also improbable. I believe that so small a proportion of the younger lawyers trying cases in the federal courts today lack the prescribed instruction that sentencing every one of them to school tomorrow could not possibly have a noticeable effect on the quality of trial advocacy. And it is, of course, only new lawyers that the Clare Committee proposal affects. When the Clare Committee actually examines the evidence, it does not claim that lack of training in trial practice is responsible in the slightest degree for observed deficiencies in federal courtrooms. On the contrary, the report confesses: "It is true that the Committee has no evidence that the direct cause of the criticism is lack of knowledge of the subject matters referred to"³ Like the doctors who prescribe antibiotics for the common cold, the Committee nonetheless proceeded to prescribe trial practice to cure an ailment not caused by a lack of trial practice.

Lest you believe that law professors have no faith in education, let me quickly disclaim any such apostasy. We believe deeply that law school instruction is worthwhile, but the education we seek to provide is only marginally concerned with subject matters and the precise contents of various rules. I used to teach Evidence. In my early years, my students presumably learned, among other things, that illegally obtained evidence is admissible in certain state courts; that for the most part in the United States a police officer need not warn a detained suspect of his right to keep silent for any confession subsequently obtained to be admissible; and a great many other things that are no longer true, though they may one day be the law again. The point is familiar to you: many of the rules we encountered as law students were gone by the time we had occasion to put them to use. The great challenge the law professoriat faces is to help students acquire the skills that will enable them to interpret and make the rules of tomorrow, not today. And we long ago despaired of teaching our students all of the law. Our goal has been to teach our graduates to be able to teach themselves so that they will not sink into obsolescence along with the rules they learned.

In this quest, what is important is that students learn something well. What that something may be is far less important. I have no objection to that something's being trial advocacy. But the chances of a student's learning it well depend at least in part on two

³ *Id.* at 177.

factors: First, it helps a student to learn if he or she has some interest in the subject matter beyond the need to come into technical compliance with technical requirements; and second, the student has a fair chance to learn something well if the school offers instruction in such a way that he or she can partake of a truly penetrating and professional experience. That is to say, something more than a superficial treatment must be made available.

Unfortunately, the Committee's proposal hurts the chances that these two conditions will be present in the education of a large number of students. If the proposal is widely adopted, I would expect virtually all of our students to hedge their bets and take the prescribed courses. Since we at Columbia already require Civil Procedure and substantive Criminal Law and almost everyone takes Evidence, the rule would mean that a significant number of Columbia students who are not otherwise interested in Criminal Procedure and Trial Advocacy would elect those courses and dutifully serve their time. Since few of them will ever have occasion to be in the federal courts, though they cannot know this for certain at the time they make their choice, they will be spending a significant portion of their time on what is for them dull and unproductive. Indeed, to cover the proposed requirements at Columbia Law School today, a student would have to take courses amounting to more than 25 percent of his or her 3-year program. This would be acceptable if we could be reasonably confident of two things: that the proposal would cure, or substantially alleviate, the problem that it attacks; and that it would be the only curricular requirement to be imposed on law schools. I have already indicated my view that the first of these conditions is not met. Let me now address the second.

We cannot be sure which jurisdictions will impose curricular requirements, nor what requirements they will impose. We do know, however, that the Court of Appeals for the Second Circuit is justly influential, and we can fairly assume that if it undertakes to prescribe curricular requirements, others will emulate it. We can fairly assume too that curricular prescriptions will not be limited to the area of advocacy. Other courts find other needs as pressing or more pressing. Last year, for example, the Indiana Supreme Court adopted an amendment of the rules governing admission to practice in Indiana⁴ that requires the successful completion of courses in 14 subject areas covering the alphabet from Conflict of Laws to Wills, Trusts, and Future Interests. Trial Practice is not included.

⁴ IND. SUP. CT. (ADM'N & DISCIPL.) R. 13(3).

Obviously, only a few different curricular requirements imposed simultaneously by different jurisdictions, even if less restrictive than Indiana's, could influence many institutions to become technical schools. They could prepare their students to meet as many requirements as possible by offering short survey courses that contribute little to a student's intellectual growth. It is unwise and imprudent for a multiplicity of bodies to impose a variety of rules on legal education, especially when no one of them is able to take responsibility for an overall approach or plan. I submit that the inevitable result of such a process is substantial damage to legal education, and hence to the bar, indeed to the quality of trial advocacy.

I could not in good conscience share a forum with Bob Clare and raise such serious objections to what he and his colleagues have done without suggesting other possible remedies. To begin with, I do not believe that we shall have a better trial bar unless we have a better bar. Yet the Committee's proposal, in defining the educational institution in which instruction must be offered, accepts "any law school recognized by the American Bar Association . . ."⁵ It is too easy to become an accredited law school. Higher standards should be required of institutions educating those responsible for serving clients and administering justice. I respectfully suggest that the energies of more of us would be well spent in the ABA's Section of Legal Education and Admissions to the Bar, as painful a sentence as that may be. Not only would efforts spent in that direction contribute to improving the quality of the bar generally, with an inevitable impact on the trial bar, they would, in addition, help to assure that steps taken to affect legal education would be national and relatively uniform.

Next, I have found the New York State bar examiners to be both accessible and reasonable. I have no basis for believing that their counterparts in other states are not similarly open to persuasion. Federal subjects commonly are neglected on bar exams, but I would expect overtures from influential committees like Brother Clare's to be well received, and, perhaps, useful additions to bar examinations might be forthcoming. Again, improvement in the bar generally without further multiplication of regulating bodies could be hoped for.

Finally, I hope I will be forgiven if I suggest that the Clare Committee has accepted an easy, ritualistic answer with little promise of success in preference to addressing the really hard questions

⁵ 67 F.R.D. at 189.

of the bench and bar's responsibility for dealing with manifest incompetence on the part of counsel. In some jurisdictions, inept drivers are required to go back to school. Our imagination is equal to devising the procedural safeguards that would both protect counsel from a capricious judge and yet give the bench adequate authority to require participation by inadequate counsel in some appropriate course of continuing legal education. The medical profession is heading down the road toward periodic recertification. Competency today, rather than course exposure in bygone years, should be the focus of our concern. Yet, on its face the proposed rule is indifferent to whether counsel retains anything of what he presumably learned in those courses he took in law school or how much time has elapsed since he last set foot in a courtroom.

I know that the Clare Committee was not charged with general responsibility for improvement of the bar. I know too the impulse to strive for improvement in whatever sector one can when given the chance to make a contribution. But there are times when the part cannot be improved without improving the whole. Indeed, there are times when to try to improve a part alone jeopardizes the whole. This is, I respectfully submit, such a time.